INDIANA SUPREME COURT LEGAL HISTORY SERIES

INDIANA'S SUPREME COURT IN THE CIVIL WAR

HOW CAN THE CONSTITUTION BE UNCONSTITUTIONAL?

BY HON. RANDALL T. SHEPARD AND DOUGLAS FIVECOAT

More than 100 years after Lee's surrender at Appomattox Courthouse, the Civil War continues to capture the attention of Americans in general and Hoosiers in particular.

There is good reason for this. Indiana's war-time governor, Oliver Perry Morton, was an ardent supporter of both the war and President Lincoln. Morton battled with the Indiana legislature over funds to pay for wartime expenses. These expenses were not inconsiderable given the willingness of Hoosiers to volunteer for service. In fact, Indiana contributed more soldiers per capita than any other state, providing a full 10% of the Union fighting force.

In this life and death struggle, many people and institutions played vital roles. This article highlights the role of Indiana's judiciary. In addition to the story of Morton's efforts to obtain funds to pay war-related costs, this piece chronicles decisions about the status of public offices whose incumbents left for the army, suspension of *habeas corpus,* and protection of individual freedom of speech during war.

The Indiana Supreme Court is re-printing this article as a part of its Legal History Series with the hope of increasing Hoosiers' knowledge and interest in their past. If you would like additional copies, they are available at no charge, under the directions found inside the back cover.

Randall T. Shepard
Chief Justice of Indiana

On the Front Cover: *"The Lincoln Four": In 1866 Indiana Supreme Court justices (l. to r.) James Frazer, Jehu Elliot, Robert Gregory, and Charles Ray declared unconstitutional Article XIII of the Indiana Constitution. The article prohibited the migration of blacks into the Hoosier State. Source: Indiana State Library, Manuscripts Division.*

Handwritten Background: *Article XIII as it appeared in the ratified Indiana Constitution of 1851. Source: Indiana State Archives.*

On the Back Cover: *"Civil War Battle Flags of Indiana." A poster created by the Indiana War Memorials Commission to heighten awareness about the need to preserve and restore these treasures.*

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INDIANA'S SUPREME COURT IN THE CIVIL WAR:
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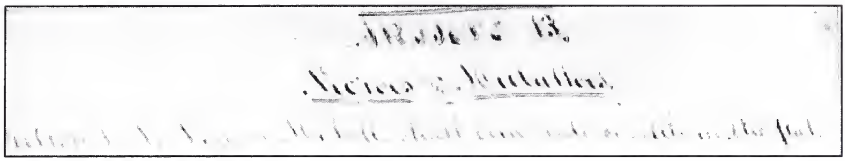


THE storied events at the Indiana Supreme Court during the Civil War years reflected the great changes that occurred in the state following its admission to the Union in 1816.

By the mid-19th century we were no longer the frontier. Indeed, Indiana was the country's seventh most populous state.[1] Freely available land and abundance of opportunity drew many to Indiana, and this rapid expansion altered the state's economic and political landscape. Hoosier politics, once dominated by Whigs, became increasingly Democratic – following the ideals of Jefferson and then Jackson. This changing political balance brought many contentious issues to the surface: controversies over slavery, race relations and states' rights, as well as debates about currency, wartime service and state finances.

As tensions between the North and South escalated, state officials had to confront these difficult issues. The Indiana Supreme Court, as arbiter of the state constitution, played a pivotal role in charting Indiana's future in the course of deciding lawsuits over these contentious matters.

The Supreme Court's decisions in the 1860s produced a legal and social legacy that has survived the generations. The Court tackled landmark cases concerning office holding and army service, the suspension of *habeas corpus*, the state budget and military appropriations, and civil rights. Controversial as they were, these decisions shaped Indiana's future and sometimes foreshadowed national policy. These cases illustrate the social and

political struggles of the era, and offer us a window through which to view the history of Hoosier justice.

BENJAMIN HARRISON GOES TO WAR

Even after Abraham Lincoln's electoral victory in 1860 and the subsequent secession of South Carolina, Hoosiers and many other Northerners hesitated to support violence against their Southern cousins. Most Indiana political leaders of both parties favored placating the South to preserve the Union.

One exception was Gov. Oliver P. Morton, who took office in January 1861 when Gov. Henry Lane became a U.S. Senator after three days in office. Morton called upon Hoosiers to "denounce treason and uphold the cause of the Union."[2] He dismissed all attempts at compromise on grounds it made the North seem weak and divided. For all of Morton's fire, the public did not embrace his strong stance until the attack on Fort Sumter.

Indiana State Library, Manuscripts Division.

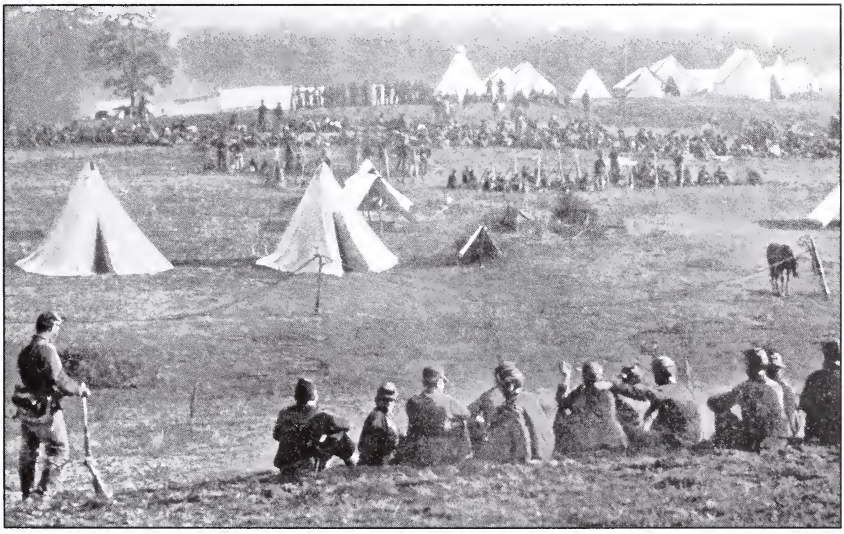
This statue of Indiana's Civil War Governor Oliver P. Morton, stands at the east entrance to the Indiana State House in Indianapolis, Indiana.

The attack on Sumter generated a wave of patriotism and a sense of urgency. As news of the attack reached Indianapolis on Saturday, April 13, 1861, throngs of people turned out for mass meetings featuring pro-Union speeches by Morton and other

prominent politicians. The next day, nearly every sermon seemed aimed at the South's aggression. Inspired by patriotic fervor, a thirst for adventure and community pressure, a vast wave of Hoosier men joined the war effort. Within a week of the Sumter attack, more than 12,000 Indiana men had volunteered for military service to crush the rebellion.

Patriotism and the chance for future political fortune inspired some men to leave their public offices and volunteer for the military. A few officials never formally resigned, but simply left for the battlefield, delegating their duties to subordinates. Others just abandoned their posts altogether, perhaps seeing some political advantage by refusing to resign after accepting military commissions.

The state constitution prohibited anyone from holding two "lucrative" positions in state government at the same time. Was volunteer service in the army a second lucrative position? This issue arrived at the Indiana Supreme Court through two important cases, *Kerr v. Jones*[3] and *State ex rel. Cornwell v. Allen*.[4]



Benjamin Harrison Home.

An Indiana regiment in a Civil War-era Army encampment.

In *Kerr*, Benjamin Harrison (the future 23rd president), then Reporter of the Indiana Supreme Court, accepted commission as a colonel in the 70th Regiment of Indiana Volunteers – a state-

formed unit within the Union army. He delegated his duties to a deputy, John Caven. At the election of October 1862, the Democrats slated a candidate for Reporter. The Republicans did not, believing that Harrison still held the office. Democrat Michael C. Kerr won the election, but met resistance from Caven and others who wanted to see Harrison retain his post.

Benjamin Harrison Home

Benjamin Harrison, twenty-third President of the United States and former Reporter of the Indiana Supreme Court. Harrison left the Court to lead Indiana's 70th Volunteer Regiment.

Kerr sued Michael Jones, Clerk of the Supreme Court, to obtain records he had given acting Reporter Craven. A Supreme Court consisting of four Democrats elected in 1858 ruled for Kerr, observing the constitution recognized only two forms of "non-lucrative" positions. The first was a militia post affording no salary, and the second was the job of deputy postmaster, which paid some $90 a year. Because Harrison was a paid officer in the state regiment, the Court declared that he could not also continue as Reporter. Judge Samuel Perkins' opinion declared that upon accepting his paid military commission Harrison automatically surrendered his office as Reporter. The Court declared Kerr the new Reporter and directed that all records be transferred to him.[5]

Likewise, Vigo County Auditor Edward B. Allen volunteered for military service, joining the 11th Regiment of Indiana Volunteers in August 1862. He neither resigned nor designated a deputy to conduct his work. Although local election officials did not post a vacancy during the 1862 elections, Burwell Cornwell

ran anyway and won a majority of the ballots. Vigo County officials denied Cornwell the office. Cornwell lost his suit in the local courts, but the Supreme Court declared Cornwell the new Auditor, on grounds different from the Harrison case. It held that the Indiana Constitution required that a county official be a resident of the county and live within it and be on hand to perform his duties. It said that Allen forfeited his office upon enlistment because he knew his military service would take him away from Vigo County and make it impossible to perform as Auditor.[6]

To be sure, these rulings featured Democratic judges sustaining claims of Democratic claimants, but they also reflected adherence to eminently reasonable constitutional rules: one paying office at a time, and be on hand to perform duties.

SUSPENSION OF *habeas corpus*

Not all Hoosiers were as eager as Benjamin Harrison and Edward Allen to join the fight. Most Hoosiers supported the war effort, but sentiment was hardly unanimous.

Indiana Historical Society

This Union Army recruitment poster seeks "snake killers"—soldiers to eradicate Southern sympathizers known as "copperheads" or "snakes in the grass."

Lincoln Republicans labeled Northerners who sympathized with the South as "copperheads" and painted them (sometimes rightly and sometimes wrongly) as subversives who were "snakes in the grass."[7] Some copperheads opposed the trend toward primacy of the federal government over the states. Others believed that the Union drafting of troops was wrong and fought the practice vehemently. Still others disagreed generally with the war and wanted to see a compromise with the South that maintained the Union or at least afforded an amicable separation. Finally, some Hoosiers opposed abolition and equal rights for blacks, which they believed, or were led to believe, were the long-term goals of President Lincoln and the Republican Party.

Assaults on copperheads portrayed them as members of dangerous secret societies like the "Sons of Liberty" and the "Knights of the Golden Circle." Efforts by these groups to hamper the war effort and obstruct the draft prompted creation of local Union leagues to counteract the threat of the feared copperhead organizations. The administrations of Morton and Lincoln supported these pro-Union societies, which were on guard for anyone showing Southern leanings and quickly reported their activities to the authorities.

The Lincoln Administration issued a series of orders granting the military wide powers to deal with copperheads and other Southern agents. In an executive proclamation on Sept. 24, 1862, President Lincoln declared "that during the existing insurrection, and as a necessary measure for suppressing the same, all rebels and insurgents, their aiders and abettors, within the United States, shall be subject to martial law, and liable to trial and punishment by court-martial or military commission."[8] This form of martial law permitted imprisoning violators with little due process and trying them in military courts.

The most famous target was Huntington lawyer Lambdin P. Milligan, who stood accused of openly inciting a citizen gathering to resist the draft – with violence if necessary. Pro-Union men reported Milligan's statements, and Union soldiers arrested him for treason in 1864. A military court sentenced him

to death, but President Lincoln stayed the execution while appeals went forward, cognizant of the important legal issues surrounding Milligan's case. Years later, the U.S. Supreme Court overturned Milligan's conviction and sentence.[9]

Congress also sought to bolster the war effort through a measure suppressing unauthorized sale of liquor to soldiers. This act allowed federal officials to suspend a *writ of habeas corpus* issued by a state court. It indemnified federal officers who took action against civilian violators, building on the earlier act regarding suspension of *habeas corpus* by arguing that unauthorized liquor sales to soldiers damaged the effectiveness of the military.

In 1863, Captain Frank Wilcox, the Federal Provost Marshal in Indianapolis, received directions to curtail alcohol sales to soldiers. He issued an order of prohibition, indicating that violators would face "severe punishment."[10] Wilcox later arrested liquor retailer Joseph Griffin for violating this order. Griffin sued Wilcox for false imprisonment in the local Marion County court. A unanimous Supreme Court, in a decision authored by Judge Perkins, ruled for Griffin. The Court noted that "no citizen, not connected with the army, can be punished by the military power of the United States, nor is he amenable to military orders."[11] The Court acknowledged that the president could exercise martial law, but only temporarily and in cases of extreme necessity.[12]

The Indiana Supreme Court decided *Griffin v. Wilcox* in 1863 when troops were in the field and the outcome of the Civil War was an open question. It represented a judicial defense of the rule of law that took a good deal more fortitude than the issuance of *Ex Parte Milligan*, written later in the security of post-war Washington.

HOW TO PAY FOR THE WAR

Lambdin P. Milligan and Joseph Griffin were hardly the only Hoosiers challenging the government's conduct of the war. Gov. Morton was such a vigorous recruiter of troops that Indiana regiments sprang up in vast numbers, but the single-mindedness

of his policies made him a lightning rod, with many enemies on the other side of the aisle. In 1863, Democrats threatened to push through a militia bill that increased the number of offices elected by the members of the militia, thus decreasing the appointments available to the governor. Republicans blocked its passage by leaving the chamber in order to destroy the quorum. This also meant there was no appropriations bill to run the state, which bore responsibility for recruiting and supplying troops but received no aid from the federal government to do so.

Indiana State Library, Manuscripts Division

The Indiana State House statute of Indiana Governor Oliver P. Morton on its dedication day.

Indiana's coffers thus ran short rapidly, and the state could not meet the interest payments on its debts or make other necessary expenditures. Despite the desperate situation, Morton refused to call a special session for fear his opponents might revive the militia bill. Eventually, Morton and the board of the New York banking firm that held the state's loans sought a court order to compel State Treasurer Joseph Ristine to authorize the interest payments.[13] *Ristine v. State ex rel. Board of Commissioners*[14] arrived at the Indiana Supreme Court in 1863.

Democrats Ristine and Attorney General Oscar Hord both asserted that a legislative appropriation was necessary to issue a warrant for funds. But the banking firm argued that a general appropriation had necessarily been created when the state borrowed the money and that failure to pay interest constituted a breach of contract and of the Indiana Constitution. Morton wrote a letter asserting that the legislature had indeed already created this general appropriation.

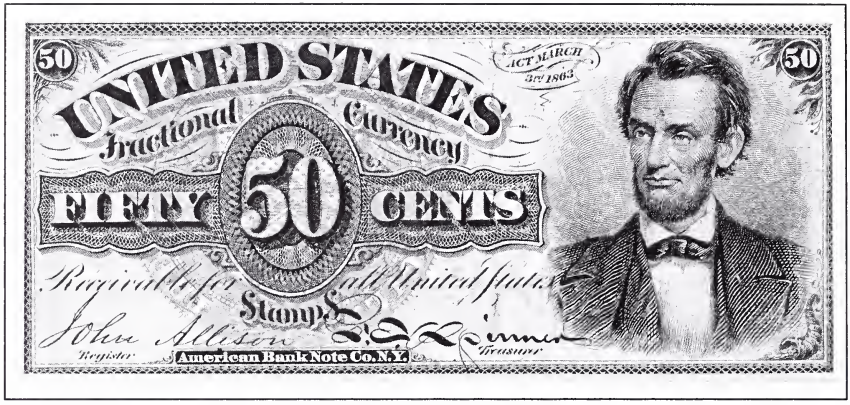
A unanimous Supreme Court, led by Judge Perkins, held that state officials like the Treasurer could not pay interest without a specific appropriation. It ruled that funds collected by the state must be placed in the state treasury before the Treasurer could use them to pay debts, in effect declaring illegal any payment made from other sources.[15] Perkins cited Article 10 of our constitution, which says funds may not be paid except "in pursuance of appropriations made by law." It likewise says that state funds shall be applied "under the direction of the Legislature." Moreover, a criminal statute forbade the Auditor from giving the Treasurer a warrant without identifying "the particular fund" set aside through appropriation.

The holdings in this case and its companions reflect settled modern law. But at the time, they created a crisis for those charged with leading the war effort.

LEGAL TENDER: PAYING FOR THE WAR IN PAPER MONEY

Legal controversy about money was not limited to battles over Indiana's treasury. Jacksonian Democrats regarded gold and silver as the only sound currency and held a low view of banks, believing that the economic power of large banks undermined democracy. Banking panics, deflation and the rhetoric of President Jackson's war against the Bank of the United States in the 1830s added to the severe distrust of banks and credit. Jackson and like-minded Democrats pushed hard for a specie-based economy, issuing a Specie Circular in 1836 that required paying gold or silver for government land. They hoped that the Circular, which forbade buying land on credit, would deter speculators but not individuals who bought small, family-sized plots as homesteaders.

This contentious issue reemerged 30 years later when President Lincoln, in search of more readily available funds to support the war, signed the Legal Tender Act on Feb. 25, 1862. This act authorized United States bank notes, designated them "legal tender for all debts public or private," and required institutions to recognize these paper bills as currency equivalent



Indiana Historical Society

A Civil War-era banknote.

to specie.[16] Democrats thought the act was beyond the federal government's power, but the Civil War forced politicians who feared for the safety of the Union to push the act through Congress without serious opposition or substantial consideration of its constitutionality. This left to states the complicated task of dealing with objections to the new act and to the use of "legal tender." Indiana's Supreme Court took up these controversies in 1862 in *Reynolds v. Bank of the State of Indiana*.[17]

John Reynolds had appeared at the South Bend branch of the Bank of the State of Indiana demanding coin for bank notes in his possession, as per the Bank's charter. The Bank refused and instead offered the amount in federal treasury notes. Reynolds sued the Bank, citing the Indiana Constitution's provision that "all bills or notes, issued as money, shall be, at all times redeemable in gold or silver."[18]

A grudging and divided Indiana Supreme Court held for the bank. Judge Perkins' majority opinion was a virtual brief against the act's constitutionality. He asserted that Congress was not expressly granted the power to make anything but coin legal tender, though he acknowledged that the power to make paper money was not specifically denied. Perkins blasted arguments that the Legal Tender Act was necessary to support the federal government's commerce power, saying that paper currency was not at all necessary to conduct trade. Perkins noted, however, that

currency was the prime medium of commerce and that since U.S. Treasury notes could be redeemed for coin at command, they did not impede the use of coin as designated in the Constitution.

Perkins and the concurring judges recognized the "local injury" that would flow if they wrongly struck down the statute, and decided to defer to Congress and to the anticipated ruling by the U.S. Supreme Court.[19] Judge James Hanna was not so deferential, saying in dissent that the act's unconstitutionality followed "as light of high twelve succeeds the morning hour."[20]

Coming in 1862, this grudging acceptance of the Legal Tender Act is especially intriguing because the Indiana Supreme Court consisted of all Democrats. The act probably survived these constitutional tests because its provisions were so central to the war effort and because the court realized just how useful such instruments were to American commerce.

THE CONSTITUTION IS UNCONSTITUTIONAL

The Indiana of 1850 had just short of a million residents, of whom only 11,262 were African-American. This homogeneity tended to reduce conflict in the greater population, but it also made Indiana slow to embrace social change and racial equality.

When Indiana rewrote its constitution in 1851, it adopted many of the reforms advocated by Jacksonian Democracy. But to our discredit, the state also adopted provisions that demonstrated prejudice.[21] Afraid that blacks fleeing from slavery would swarm into Indiana if measures were not taken to stop them, delegates proposed the infamous Article XIII, which prohibited any Negro or mulatto from entering the state, and declared void all contracts made by them or with them. Some delegates supported the controversial measure because they feared that a race war would otherwise ensue. Other delegates fought the article. Delegate Nathan B. Hawkins called it "an outrage upon all the principles of our boasted institutions."[22]

The convention submitted Article XIII to the voters separately from the main body of the constitution. The voters

approved it by more than a 5:1 margin. Though Article XIII was not generally enforced during the ensuing years, its provisions epitomized the pervasiveness of prejudice and discrimination.[23]

The Supreme Court heard a challenge to Article XIII in *Smith v. Moody*.[24] It was a wholly new Supreme Court of four Republicans: James Frazer, Jehu Elliott, Charles Ray and Robert Gregory, all chosen during the 1864 election when Lincoln and Morton headed the ticket.

Smith, a black man, sued Moody on a promissory note. Moody refused to pay on grounds that Smith was a "negro, or person of African descent, and that prior to Nov. 1, 1851, he was a non-resident of the state of Indiana." According to Article XIII, Smith was prohibited from settling in Indiana in the first place, and any contracts made with him after 1851 were void.[25]

Writing for a unanimous court, Judge Robert Gregory declared that Moody and all Americans of African descent born free within the United States were citizens of the United States and as such were freely entitled to become citizens of any of the several states under the Privileges and Immunities Clause.[26] Gregory said that Article XIII illegally deprived people like Moody of the government's protection and the enjoyment of life and liberty. While holding that black Americans possessed rights like freedom of movement and contract, Gregory stopped short of sanctioning their right to vote or hold public office, saying these were not essential characteristics of citizenship. He noted that women were citizens with many freedoms, yet they were not allowed to vote or hold office, and that immigrants could become naturalized citizens but could not run for president.[27]

The Court voided Article XIII and its harsh restrictions against African-Americans based on the U.S. Constitution's Privileges and Immunities Clause, with just a passing reference to the 13th Amendment.[28]

It would have been easy to invalidate Article XIII once the 14th and 15th Amendments to the U.S. Constitution were adopted in the late 1860s. Voiding it after the close of the Civil

Indiana State Library, Manuscripts Division.

The Indiana Soldiers' and Sailors' Monument, initially created to commemorate Indiana soldiers serving in the Civil War, is located in Monument Circle, the center of the Mile Square plat in Indianapolis, Indiana. President Benjamin Harrison spoke at the monument's dedication in 1902.

War under the Privileges and Immunities Clause was a dramatic judicial act.

CONCLUSION

The Civil War was our country's most dramatic and defining moment. We customarily focus on stories of the generals and the armies, governors and the president. But the struggle engaged the entire nation and its institutions, such that even normally quiet places like the Indiana Supreme Court became central to the saga.

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19. *Reynolds*, at 474-75.
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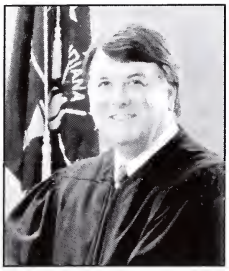
28. *Id.* at 307.



Chief Justice of Indiana Randall T. Shepard of Evansville was appointed to the Indiana Supreme Court by Gov. Robert D. Orr in 1985 at the age of 38. He became Chief Justice of Indiana in March 1987.

A seventh generation Hoosier, Shepard graduated from Princeton University, *cum laude*, and from the Yale Law School. He earned a Master of Laws degree in judicial process from the University of Virginia.

Shepard was judge of the Vanderburgh Superior Court from 1980 until his appointment. He earlier served as executive assistant to Mayor Russell Lloyd of Evansville and as special assistant to the Under Secretary of the U.S. Department of Transportation.

Douglas Fivecoat served as a public history intern in the Chief Justice's chambers for the 2004-05 school year. During that time, he oversaw the transformation of a long-forgotten manuscript on Judge Isaac Blackford into a publishable document. *Isaac Blackford: Indiana's Blackstone*, edited by Fivecoat, was published in September 2005.

Fivecoat recently completed his master's degree in public history from Indiana University-Purdue University Indianapolis and is currently studying law at Indiana University School of Law-Indianapolis.

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